Federal Land Development Authority & Anor v Tan Sri Hj Mohd Isa bin Dato' Hj Abdul Samad & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-843–11 OF 2019
WONG CHEE LIN J
25 SEPTEMBER 2020

Arbitration — Arbitration clause — Existence of — Whether arbitration clause was automatically incorporated into memorandum of understanding

Arbitration — Arbitration proceeding — Continuation of arbitration proceeding — Whether continuation of arbitration proceeding caused vexatious, oppressive and unconscionable to plaintiff — Whether interim injunction retraining arbitration proceeding was allowed — Whether there were serious issues to be tried — Whether damages would not be a sufficient remedy

On 14 November 2019, the first plaintiff ('FELDA') and the second plaintiff ('FIC') commenced the action in respect of the wrongdoings and conspiracy against Synergy Promenade Sdn Bhd ('SPSB'), Synergy Promenade KLVC Sdn Bhd ('SPKLVC'), Abd Rahman bin Soltan ('Abd Rahman'), Noraini bt Soltan ('Noraini') and 17 other defendants. In essence, both plaintiffs, FELDA and FIC sought to set aside the development agreement, the power of attorney, lease agreement, sale and purchase agreements dated, memorandums of transfer, deed of assignment of lease and memorandum of understanding ab initio. By a notice of arbitration, the defendant ('SPSB') commenced arbitration proceedings ('the arbitration proceedings') against the second plaintiff in the Asian International Arbitration Centre ('AIAC'). SPSB sought for: (a) declaration that the development agreement executed between SPSB and FIC was a valid and binding agreement; and (b) specific performance of the terms of the development agreement. The arbitration proceedings was commenced pursuant to article 9.04 of the development agreement. By encl 61, the plaintiffs sought for an interim injunction restraining SPSB from taking any or further step to continue with the arbitration proceedings pending the final disposal of Suit 843.

Held, allowing the plaintiff's application in encl 61 with costs:

(1) The court was of the view that no sufficient incorporation of the terms of the development agreement into the terms of the MOU. A mere reference to the development agreement did not automatically incorporate the arbitration clause contained in it into the MOU. To

incorporate the arbitration clause into the MOU, there must be very clear and specific words to that effect. It must be shown that FELDA has expressly agreed to arbitrate. There was nothing in the MOU which showed FELDA's agreement to arbitrate (see para 35).

(2) The continuation of the arbitration proceedings would not be vexatious, oppressive or unconscionable to FIC and it would not be just and convenient to grant the injunction sought by FIC. No injunction on the application of FIC would be granted as the court was of the view that, as regards a non-party, the court would exercise its discretion to grant an interim anti-arbitration injunction sought by a non-party, if: (a) there are serious issues to be tried; (b) the balance of convenience lies in favour of granting the injunction; and (c) damages would not be an adequate remedy. FELDA has met the threshold of showing that there were serious issues to be tried in the case (see paras 40–41 & 43).

(3) The issues in the arbitration proceedings and the issues in the court proceedings could not be divided distinctly. There was clearly an overlap of issues and the risk of inconsistent decisions. It was in the interest of justice for the court proceedings to proceed first. In that event, the arbitration proceedings could continue if the court were to rule that the development agreement was valid. If the court were to decide that the development agreement was null and void and illegal, then there would be no need for any arbitration proceedings (see para 55).

(4) There was merit in the contention that damages would not be an adequate remedy as the arbitration proceedings will affect FELDA's proprietary rights in the FELDA Semarak lands and it would also affect FELDA's right to be heard although FELDA could choose to be a witness in the arbitration proceedings. The court agreed that SPSB had not shown that it was in the position to pay any substantial damages to the plaintiffs. The damages would not be an adequate remedy since SPSB had not demonstrated its ability to pay damages (see paras 57–58).

[Bahasa Malaysia summary

Pada 14 November 2019, plaintif pertama ('FELDA') dan plaintif kedua ('FIC') memulakan tindakan berkenaan dengan kesalahan dan konspirasi terhadap Synergy Promenade Sdn Bhd ('SPSB'), Synergy Promenade KLVC Sdn Bhd ('SPKLVC'), Abd Rahman bin Soltan ('Abd Rahman'), Noraini bt Soltan ('Noraini') dan 17 defendan yang lain. Secara dasarnya, kedua-dua plaintif, FELDA dan FIC memohon untuk mengetepikan perjanjian pembangunan, surat wakil kuasa, perjanjian sewaan, perjanjian jual beli bertarikh, memorandum pindah milik, surat ikatan serah hak sewaan dan memorandum persefahaman. Melalui satu notis timbang tara, defendan ('SPSB') memulakan prosiding timbang tara ('prosiding timbang tara') terhadap defendan kedua di Pusat Timbang Tara Antarabangsa Asia ('AIAC').

SPSB memohon: (a) satu deklarasi bahawa perjanjian pembangunan yang ditandatangani antara SPSB dan FIC adalah perjanjian yang sah dan mengikat; dan (b) perlaksanaan spesifik terma-terma perjanjian pembangunan tersebut. Prosiding timbang tara dimulakan bersesuaian dengan perkara 9.04 perjanjian pembangunan tersebut. Melalui lampiran 61, plaintif memohon injunksi interim bagi menghalang SPSB daripada mengambil atau meneruskan langkah selanjutnya terhadap prosiding timbang tara sementara menunggu pelupusan muktamad Guaman 843.

Diputuskan, membenarkan permohonan plaintif di lampiran 61 dengan kos:

(1) Mahkamah berpendapat bahawa tidak ada sebarang kemasukkan terma-terma perjanjian pembangunan yang mencukupi ke dalam terma MOU. Rujukan semata-mata kepada perjanjian pembangunan tidak secara automatik memasukkan klausa timbang tara yang terkandung di dalamnya ke dalam MOU. Untuk memasukkan klausa timbang tara ke dalam MOU, ia seharusnya mempunyai perkataan yang sangat jelas dan spesifik untuk penggunaannya. Ianya harus dibuktikan bahawa FELDA telah dengan jelas bersetuju untuk ke timbang tara. Tidak ada apa-apa dalam MOU yang menunjukkan persetujuan FELDA untuk ke timbang tara (lihat perenggan 35).

(2) Perlanjutan prosiding timbang tara tidak akan meremehkan, menindas atau tidak menyenangkan FIC dan ianya adalah tidak adil dan senang untuk membenarkan injunksi yang dimohon oleh FIC. Tidak ada injunksi berdasarkan permohonan oleh FIC kerana mahkamah berpendapat bahawa, berkenaan dengan bukan pihak, mahkamah akan menggunakan budi bicaranya untuk membenarkan injunksi interim anti-timbang tara yang dimohon oleh bukan pihak, jika: (a) terdapat isu serius untuk dibicarakan; (b) imbangan kemudahan berpihak kepada pemberian injunksi; dan (c) ganti rugi tidak akan menjadi remedi yang memadai. FELDA telah memenuhi ambang dalam membuktikan bahawa terdapat isu serius yang harus dibicarakan dalam kes tersebut (lihat perenggan 40–41 & 43).

(3) Isu dalam prosiding timbang tara dan isu dalam prosiding mahkamah tidak dapat dibahagikan secara sama rata. Ianya adalah jelas terdapat pertindihan isu dan risiko keputusan yang tidak konsisten. Ia adalah demi kepentingan keadilan supaya prosiding mahkamah berjalan terlebih dahulu. Dalam hal tersebut, prosiding timbang tara akan diteruskan sekiranya mahkamah memutuskan bahawa perjanjian pembangunan adalah sah. Sekiranya mahkamah memutuskan bahawa perjanjian pembangunan tersebut adalah terbatal dan tidak sah, maka tiada keperluan untuk prosiding timbang tara (lihat perenggan 55).

(4) Terdapat merit dalam penghujahan bahawa ganti rugi bukanlah remedi yang memadai kerana prosiding timbang tara akan memberi kesan

kepada kepentingan milikan oleh FELDA pada tanah FELDA Semarak dan ia juga akan memberi kesan kepada hak FELDA untuk didengar walaupun FELDA boleh memilih untuk menjadi saksi dalam prosiding timbang tara. Mahkamah bersetuju bahawa SPSB tidak membuktikan bahawa ia berkemampuan untuk membayar sebarang ganti rugi yang besar kepada plaintif. Ganti rugi tersebut tidak akan menjadi remedi yang memadai kerana SPSB tidak menunjukkan kemampuannya untuk membayar ganti rugi (lihat perenggan 57–58).]

Cases referred to

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545, CA (refd)
Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71, CA (refd)
J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd [2007] EWHC 1262 (TCC), QBC (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, FC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Protasco Bhd v Tey Por Yee and another appeal [2018] MLJU 993; [2018] 5 CLJ 299, CA (refd)
Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor [2013] MLJU 1622; [2013] 8 CLJ 86, HC (refd)
Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2016] 1 LRC 147, CA (refd)

Legislation referred to

Federal Territory of Kuala Lumpur Land Rules 1995 Schedule 17
Land Development Act 1956 s 3(3)(c)
National Land Code s 340(2)

Kanaga Shanta Kumar Kanagasingam (Mong Chung Seng, Michele Yee Phui Hwa and Medha Ong Ann Ting with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiffs.
Gopal Sri Ram (RK Sharma, Amrit Pal Singh, Ng Jun Wei, Austen Pereira, Phang Zheng Jack with him) (Amrit & Co) for the fifth to eight defendants.

Wong Chee Lin J:

[1] On 14 November 2019, the first plaintiff ('FELDA') and the second plaintiff ('FIC') commenced this action in respect of the wrongdoings and conspiracy against Synergy Promenade Sdn Bhd ('SPSB'), Synergy Promenade KLVC Sdn Bhd ('SPKLVC'), Abd Rahman bin Soltan ('Abd Rahman'), Noraini bt Soltan ('Noraini') and 17 other defendants.

[2] In essence, FELDA and FIC are seeking, inter alia, to set aside the

development agreement dated 2 June 2014 ('development agreement' or 'DA'), the power of attorney dated 3 June 2014 ('power of attorney'), lease agreement dated 24 February 2015, sale and purchase agreements dated 2 December 2015 and 7 November 2016 ('SPA's'), 16 memorandums of transfer ('MOTs'), deed of assignment of lease dated 29 September 2016 ('DoAL') and memorandum of understanding dated 15 January 2018 ('MOU') ab initio.

[3] By a notice of arbitration dated 25 November 2019, the defendant ('SPSB') commenced arbitration proceedings ('arbitration proceedings') against the plaintiff ('FIC') in the Asian International Arbitration Centre ('AIAC'). SPSB, inter alia, seeks:

(a) declaration that the development agreement executed between SPSB and FIC is a valid and binding agreement; and

(b) specific performance of the terms of the development agreement (apart from the specific performance of article 6.04 of the development agreement which is being sought by SPSB in Kuala Lumpur High Court Suit No WA-22NCVC-477–07 of 2019).

[4] The arbitration proceedings was commenced pursuant to article 9.04 of the development agreement ('arbitration clause').

[5] By encl 61, FELDA and FIC are seeking, inter alia, an interim injunction restraining SPSB from taking any or further step to continue with the arbitration proceedings pending the final disposal of Suit 843.

[6] I have allowed the application. These are the full reasons for my decision.

BACKGROUND FACTS

[7] FELDA is statutory body established on 1 July 1956 under the Land Development Ordinance 1956 (now the Land Development Act 1956) ('the LDA') for the development of land and relocation of FELDA settlers with the objective of eradicating poverty in rural areas through the cultivation of palm oil and rubber. FIC is a wholly-owned subsidiary of FELDA.

[8] At all material times, FELDA is the registered proprietor and beneficial owner of the 24 parcels of land along Jalan Semarak, Kuala Lumpur ('FELDA Semarak lands').

[9] FIC and SPSB executed the development agreement ostensibly for the purposes of developing the FELDA Semarak lands ('proposed KLVC project').

[10] Article 6.04 of the development agreement provides FIC shall cause

FELDA to deliver vacant possession of FELDA Semarak lands to SPSB within 30 days from the date of the development agreement.

[11] The development agreement annexed the power of attorney, purportedly given by FELDA in favour of SPSB to deal with the FELDA Semarak lands.

[12] FELDA and FIC contend that the development agreement and power of attorney were executed without the approval of the Minister in charge of FELDA at the material time, who was the sixth Prime Minister of Malaysia, Dato' Seri Najib Razak ('FELDA Minister') required under s 3(3)(c) of the LDA.

[13] Further, FELDA and FIC contend:

(a) SPSB, SPKLVC and their directors, Abd Rahman and Noraini (ie fifth to eight defendants) and their solicitors, Messrs Yeap, Yong & Amy ('Messrs YYA') (ie 12th to 15th defendants); and

(b) certain members of the board of directors of FELDA ('FELDA's previous board'), previous management of FELDA ('FELDA's previous management'), previous board of directors of FIC ('FIC's previous board') and previous management of FIC ('FIC's previous management') who are named as the first to fourth, ninth to 11th and 16th to 20th defendants in this action and were appointed or employed prior to the 14th General Election,

or any two or more of them (collectively, 'conspirators') carried out a series of conspiracy against FELDA and/or FIC to cause loss and damage to FELDA and/or FIC.

[14] The conspirators allegedly caused FELDA and FIC to enter into a series of fraudulent dealings on FELDA Semarak lands to systematically defraud or injure FIC and FELDA or deprive FELDA of their interest and rights in the FELDA Semarak lands through the following agreements and instruments:

(a) development agreement between FIC and SPSB;

(b) power of attorney granted by FELDA in favour of SPSB;

(c) the lease agreement executed between FIC (acted by FIC's previous board and/or FIC's previous management) and SPSB;

(d) the SPA's and MOTs executed by SPSB, purportedly as the attorney of FELDA, between 21 July 2016 and 6 March 2017 with regard to the purported sale and purchase and transfer of the FELDA Semarak lands to SPSB and SPKLVC; and

(e) The DoAL executed by SPSB on behalf of both FELDA (as the purported attorney of FELDA) and SPKLVC with regard to the purported assignment of FELDA's rights under the lease agreement.

('first conspiracy').

[15] FEDLA and FIC contend that in an attempt to cover up the first conspiracy, the conspirators (acted by FELDA previous board), SPSB, SPKLVC and their directors, Abd Rahman and Noraini cause FELDA to execute the MOU ('second conspiracy').

[16] On 1 March 2018 and 8 March 2018, SPSB and SPKLVC re-transferred the 16 parcels of the FELDA Semarak lands (which were earlier transferred via the MOTs) to FELDA.

[17] After the 14th General Election on 8 May 2018, FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management were gradually replaced. Thereafter, the new board of directors of FELDA and FIC allegedly discovered the wrongdoings summarised above.

[18] The following proceedings have been commenced in regard to the parties' disputes in relation to inter alia the FELDA Semarak lands, development agreement and Proposed KLVC Development:

	Proceedings	Date of Commencement/ Status
(a)	Kuala Lumpur High Court Originating Summons No WA-24NCVC-795–04 of 2019 SPSB & SPKLVC v FELDA & Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur ('Suit 795')	Commencement: 12 April 2019 Status: Pending in the High Court
(b)	Kuala Lumpur Civil Suit No WA-22NCVC-477–07 of 2019 SPSB V FELDA & FIC ('Suit 477')	Commencement: 9 July 2019 Status: Pending in the High Court
(c)	Kuala Lumpur Civil Suit No WA-22NCVC-843–11 of 2019 FELDA & FIC v 21 defendants, including SPSB, SPKLVC, Abd Rahman & Noraini ('Suit 843')	Commencement: 14 November 2019 Status: Pending in the High Court

	Proceedings	Date of Commencement/ Status
(d)	In the matter of an AIAC Arbitration No AIAC/D/ADM-788 of 2019 SPSB v FIC ('arbitration proceedings')	Commencement: 25 November 2019 Status: Pending in AIAC
(e)	Kuala Lumpur High Court Civil Originating Summons No WA-24NCVC(ARB)-5–01 of 2020 FIC v SPSB ('Suit 5')	Commencement: 24 January 2020 Status: Suit 5 was dismissed by the High Court. FIC has appealed to the Court of Appeal and it is still pending.

[19] On 12 April 2019, SPSB and SPKLVC commenced Suit 795 against, inter alia, FELDA to set aside the re-transfer of the ownership of Lot 390 and Lot 29788, which are part of the FELDA Semarak lands to FELDA on the grounds, inter alia, that:

(a) SPSB, purportedly acting as the attorney of FELDA pursuant to the power of attorney given under the development agreement, executed the SPA's on FELDA's behalf and sold Lot 390 to SPKLVC and 14 parcels of the FELDA Semarak lands, including Lot 29788 to themselves (ie SPSB);

(b) on 21 July 2015 and 6 March 2017, SPSB purportedly acting as the attorney of FELDA, transferred Lot 390 to SPKLVC and Lot 29788 to itself via the MOT's;

(c) SPKLVC and SPSB became the registered proprietors of Lot 390 and Lot 29788;

(d) on 8 March 2018, Lot 390 and Lot 29788 were re-transferred back to FELDA; and

(e) SPSB and SPKLVC did not apply and/or submit the application form provided under Schedule 17 of the First Schedule of the Federal Territory of Kuala Lumpur Land Rules 1995 for consent to transfer Lot 390 and Lot 29788 to FELDA. Therefore, the registration of the transfer of ownership of Lot 390 and Lot 29788 to FELDA was premised on insufficient instrument and is therefore defeasible pursuant to s 340(2) National Land Code and ought to be set aside.

[20] FELDA is contesting Suit 795 on, inter alia, the following grounds:

(a) the development agreement and power of attorney are unenforceable, null and void as without the FELDA Minister's approval, they were

executed ultra vires s 3(3)(c) of the Act;

(b) as the development agreement and the power of attorney are unenforceable, null and void ab initio, other documents such as the lease agreement, the SPAs, the MOTs and the DoAL are similarly null and void ab initio as their performance are dependent entirely on the validity of the development agreement and the power of attorney;

(c) further or in the alternative, the development agreement, the power of attorney, the lease agreement, the SPAs, the MOTs and the DoAL are all tainted with fraud and were executed pursuant to and in furtherance to the first and second conspiracies by the conspirators to defraud and injure FELDA. Accordingly, these documents are unenforceable, null and void liable to be set aside ab initio;

(d) the SPAs in respect of Lot 390 and Lot 29788 and their consequent transfer via the MOTs are unenforceable, null and void and defeasible ab initio by reasons of fraud, void or insufficient instrument or that the titles of Lot 390 and Lot 29788 were unlawfully acquired by SPSB and SPKLVC in contravention of the LDA or the power of attorney read with the development agreement. In the circumstances, the title to Lot 390 and Lot 29788 ought not to have been transferred and registered in the names of SPSB and SPKLVC in the first place. Consequently, the issue of purported wrongful subsequent re-transfer of Lot 390 and Lot 29788 to FELDA does not arise;

(e) FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management have breached their fiduciary duties towards FELDA and FIC respectively; and

(f) further, SPSB's directors namely Abd Rahman and Noraini assisted FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management to breach their fiduciary duties towards FELDA and FIC respectively.

[21] In response, SPSB and SPKLVC claimed, inter alia:

(a) although the FELDA Minister's approval was not obtained, the development agreement is valid and enforceable; and

(b) SPSB, SPKLVC, Abd Rahman and Noraini are not involved in the first and second conspiracies.

[22] Suit 795 is still pending before the court.

[23] On 9 July 2019, SPSB commenced Suit 477 against FELDA and FIC seeking specific performance of article 6.04 of the development agreement for delivery of vacant possession of 23 lots of the FELDA Semarak lands

(excluding Lot 390). SPSB claims FIC has failed to deliver vacant possession of the 23 lots of the FELDA Semarak lands to SPSB within 30 days from the date of the development agreement, contrary to article 6.04 of the development agreement.

[24] FELDA and FIC are contesting Suit 477 essentially on the grounds set out in para 20 above.

[25] In reply, SPSB, inter alia, contends:

(a) the development agreement is valid and binding;

(b) SPSB denies that the development agreement is unlawful, immoral and/or against public policy; and

(c) SPSB did not conspire against FELDA and FIC.

[26] On 31 July 2019, SPSB applied for summary judgment against FELDA and FIC. On 23 July 2020, Justice Azimah Omar dismissed SPSB's summary judgment application. In dismissing SPSB's summary judgment application, Justice Azimah Omar held, inter alia, that there are serious issues to be tried, inter alia, concerning the validity of the development agreement as the Minister's approval was not obtained.

[27] On 29 October 2019, FELDA and FIC applied to strike out Suit 477 on the ground, inter alia, that SPSB's claim is barred by limitation period. The striking out application is still pending in court.

[28] On 14 November 2019, FELDA and FIC filed this action against the defendants, inter alia, to set aside the development agreement, the power of attorney, the lease agreement, the SPA's, the MOTs, the DoAL and the MOU.

[29] On or about 25 November 2019, SPSB invoked the arbitration clause and commenced the arbitration proceedings against FIC in the AIAC.

[30] SPSB's claim in the arbitration proceedings in essence is as follows:

(a) FIC, in breach of article 6.04 of the development agreement, only delivered vacant possession of Lot 390 to SPSB and had failed to deliver vacant possession of the other 23 lots of the FELDA Semarak lands;

(b) SPSB commenced Suit 477 against FELDA and FIC for specific performance of article 6.04 of the development agreement and a consequential order directing FELDA and FIC to deliver vacant possession of the other 23 lots of the FELDA Semarak lands;

(c) SPSB contends FIC now claims that the development agreement is null

and void. SPSB also contends FIC has breached the development agreement or does not intend to comply with it;

(d) the points in issue in the arbitration proceedings ('arbitration issues') are, inter alia, as follows:

(i) whether the development agreement is valid and binding;

(ii) whether FIC has breached the development agreement;

(iii) whether the development agreement is tainted with fraud and/or illegality, and is therefore null and void, unenforceable and/or is liable to be set aside;

(iv) whether the SPSB conspired with the intent to defraud and injure FIC by entering into the development agreement;

(v) whether the terms of the development agreement would cause substantial losses to FIC; and

(vi) whether SPSB is entitled to recover from FIC the loss suffered by SPSB as a result of FIC's breaches.

(e) SPSB, inter alia, seeks:

(i) declaration that the development agreement executed between SPSB and FIC is a valid and binding agreement; and

(ii) specific performance of the terms of the development agreement (apart from the specific performance of article 6.04 of the development agreement which is being sought by SPSB in Suit 477) or lieu thereof, damages caused by FIC's failure to deliver vacant possession of the FELDA Semarak lands (save for Lot 390).

[31] From the statement of case, the only breach alleged by SPSB is in regard to the failure of FIC to deliver vacant possession of the FELDA Semarak lands. It is relevant to note that this is also the crux of SPSB's claim against FELDA and FIC in Suit 477.

[32] By encl 61, FELDA and FIC seek, inter alia, an interim injunction restraining SPSB from taking any or further step to continue with the arbitration proceedings pending the final disposal of Suit 843.

FINDINGS OF THE COURT

[33] At the outset, it should be noted that whilst FIC is a party to the arbitration agreement with SPSB, FELDA is not a party to the arbitration agreement.

[34] The fifth to eight defendants have submitted that FELDA is also a party to the arbitration agreement. They say that the provisions of the development agreement where the arbitration clause is found, had been incorporated into the MOU. They say this because the MOU recognises that SPSB continues to be the master developer pursuant to the terms and conditions of the development agreement.

[35] I am of the view that those words do not amount to a sufficient incorporation of the terms of the development agreement into the terms of the MOU. A mere reference to the development agreement does not automatically incorporate the arbitration clause contained in it into the MOU. To incorporate the arbitration clause into the MOU, there must be very clear and specific words to that effect. It must be shown that FELDA has expressly agreed to arbitrate. There is nothing in the MOU which shows FELDA's agreement to arbitrate. It was held in *Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor* [2013] MLJU 1622; [2013] 8 CLJ 86 that:

> The series of cases ranging from *TW Thomas & Co Limited v Portsea Steamship Company Limited* [1912] AC 1 through to *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm); [2010] 1 All ER (Comm) 1143 are authority for the proposition that in order to incorporate the effect of an arbitration clause in one agreement into another agreement, there must be very clear and specific words to that effect. In short the third party must be seen to have expressly agreed to arbitrate. A distinction is made between single party and two party contractors. A much stricter test is applicable for two party contracts as is the case here.

(See also *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545).

[36] FELDA is not a party to the arbitration agreement and this has been implicitly recognised by SPSB itself and explains the reason why FELDA was not joined as a defendant in the arbitration proceedings. If FELDA was a party to the arbitration agreement, it would have been a necessary and proper party because the DA deals with the Jalan Semarak lands which are owned by FELDA.

[37] The test as to whether the court would grant an anti-arbitration injunction differs depending on whether the application is made by a party to the arbitration agreement or a non-party.

[38] In the case of *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC) it was held that for an injunction to be granted, it must be shown that the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process. In *J Jarvis*, the main contractor was the claimant in the court proceedings and defendant in the arbitration. The defendant in the court proceedings was the claimant in the

arbitration. The claimant in the court proceedings sought to obtain an injunction to prevent the continuance of the arbitration proceedings. Both parties were parties to the arbitration agreement. The High Court there in para [40] derived four propositions from the review of authority:

> (i) The court's power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to grant an injunction to restrain an arbitration from proceeding.
>
> (ii) That power may be exercised if two conditions are satisfied, namely:
>
> (a) The injunction does not cause injustice to the Claimant in the arbitration; and
>
> (b) The continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.
>
> (iii) The court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.
>
> (iv) Delay by the party applying for an injunction is material to the court's exercise of discretion and may in some cases be fatal to the application.

[39] This test is inapplicable and of no relevance to a non-party to arbitration proceedings.

[40] The court in Suit 5 has recently refused to grant a permanent injunction to restrain the arbitration proceedings on the application of FIC and has held that the continuation of the arbitration proceedings would not be vexatious, oppressive or unconscionable to FIC and it would not be just and convenient to grant the injunction sought by FIC. I see no reason to differ from the decision of the learned JC in Suit 5. Accordingly, I would not grant the injunction on the application of FIC.

[41] I am of the view that, as regards a non-party, the court would exercise its discretion to grant an interim anti-arbitration injunction sought by a non-party if:

(a) there are serious issues to be tried;

(b) the balance of convenience lies in favour of granting the injunction; and

(c) damages would not be an adequate remedy.

(See *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193).

[42] In *Jaya Sudhir* the Federal Court held that the higher threshold in *J Jarvis* does not apply to a non-party. This is what the Federal Court held:

Now, reverting to the present appeal, one thing is clear, that is that the basis for the imposition of a higher threshold is flawed because Act 646, as we have earlier held, does not apply to the appellant. It therefore follows that the Court of Appeal has misdirected itself in rejecting the *Keet Gerald Francis* test. We can discern a difference between *J Jarvis* and the instant suit. In a nutshell, the *J Jarvis* test is in applicable and is of no relevance to a non-party to arbitration proceedings. In the *J Jarvis* line of cases, parties seeking an injunction to restrain arbitration proceedings are the contracting parties to the arbitration agreement. This feature and distinction are crucial. In such cases, where a party to arbitral proceedings seeks to restrain the continuance of the arbitration proceedings a higher or different test or threshold imposed would be a logical and sensible requirement given the contractual obligations entered into by the party seeking to restrain the arbitral proceedings. Put in another fashion, the plaintiff who seeks to restrain arbitral proceedings is a party to an arbitration agreement and a party to the arbitral proceedings. This is not the case in the present suit. We have said several times that the appellant is not a party to the arbitration agreement and proceedings.

[43] I am of the view that FELDA has met the threshold of showing that there are serious issues to be tried in this case. These issues are as follows:

(a) whether the development agreement contravenes s 3(3)(c) of the LDA and therefore is null and void/or unenforceable?

(b) if the development agreement is null and void ab initio due to the contravention of s 3(3)(c) of the LDA, whether the power of attorney, lease agreement, SPAs, MOTs and DoAL are also null and void ab initio?

(c) if the development agreement is null and void ab initio, whether the arbitration clause therein is valid and enforceable?

(d) whether the conspirators conspired to cause FELDA and FIC to execute the letter of award, development agreement, power of attorney, the lease agreement, the SPAs, the MOTs, DoAL and MOU ('disputed agreements & instruments') and if so, whether this renders the disputed agreements & instruments null, void and/or unenforceable?

(e) whether the SPAs dated 2 December 2015 and 7 November 2016 in respect of Lot 390 and Lot 29788 and their consequent transfer via the MOTs are unenforceable, null and void and defeasible ab initio by reasons of fraud, void or insufficient instrument or that the titles of Lot 390 and Lot 29788 were unlawfully acquired by SPSB and SPKLVC in contravention of the LDA or the power of attorney read with the development agreement?

(f) whether there is a total failure of consideration on the part of SPSB and SPKLVC under the SPAs and MOTs and therefore, they are unenforceable, null and void and liable to be set aside ab initio?

(g) whether the MOU was executed to cover up the first conspiracy perpetrated by the conspirators and therefore, is unenforceable, null and void and liable to be set aside ab initio?

(h) whether FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management have breached their fiduciary duties towards FELDA and FIC? and

(i) whether SPSB, SPKLVC, Abd Rahman and Noraini and their solicitors, Messrs YYA dishonestly assisted FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management to breach their fiduciary duties towards FELDA and FIC?

[44] On the balance of convenience, FELDA has raised various cogent reasons in support of its application.

[45] In dealing with these reasons, I bear in mind that trial dates in my court are now fixed in May 2022, given the state of my diary. In the normal course of events, I would anticipate the earliest the court can hear this suit to be sometime in 2022. Compare this with the hearing dates of the arbitration proceedings in March 2021. Justice delayed is justice denied. I have to take this into consideration when deciding whether to exercise my discretion to restrain the arbitration proceedings. If the court proceedings are to be disposed of before the arbitration proceedings, this will mean a delay of almost two years in the arbitration hearing. The balance of convenience would have to lean very heavily in favour of FELDA before I exercise my discretion in its favour, taking into account the delay that will be involved in disposing of the court proceedings.

[46] In the case of *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 LRC 147, the Singapore Court of Appeal held that the following circumstances must be considered in considering whether court proceedings should be stayed or proceed when there are arbitration proceedings on foot:

(a) the relationship between the parties to the court proceedings and the parties to the arbitration;

(b) the claims in the court proceedings and those in the arbitration;

(c) issue estoppel;

(d) the risk of inconsistent findings between the two sets of proceedings;

(e) the risk of delay; and

(f) cost.

[47] FELDA submits that it will suffer prejudice if the injunction sought is not granted as any arbitral award to be given in the arbitration proceedings would necessarily affect and involve a determination of FELDA's proprietary rights in the FELDA Semarak lands but without FELDA's participation in the arbitration proceedings.

[48] There is merit in this contention. The development agreement concerns the development of the FELDA Semarak lands which belong to FELDA, not FIC. A finding that the development agreement is valid and binding will have an effect on FELDA's proprietary interest in the FELDA Semarak lands. Furthermore, FELDA has a right to challenge the legality of the development agreement in the court proceedings. FIC and SPSB will remain parties to the court proceedings even if I were to stay the claim by FIC against SPSB because FELDA has claims against SPSB and FIC has claims against the other defendants which are not the subject matter of an arbitration agreement. This means that the validity of the development agreement will be issues in both the court proceedings and the arbitration proceedings and there will be a risk of inconsistent decisions.

[49] FELDA contends that there will be multiplicity of proceedings, risk of inconsistent findings and inconvenience caused if the injunction sought is not granted.

[50] As for the allegations of conspiracy, the only issues to be decided in the arbitration proceedings concern the issue whether SPSB is a party to the conspiracy against FIC. There again I can see the possibility of duplicity of issues and the risk of inconsistent decisions if the anti-arbitration injunction were not granted. Assuming the arbitrator finds that SPSB had conspired with all or any of the other defendants to defraud FIC, presumably the other defendants will want to dispute that in the court proceedings and it is open to the other defendants to challenge these findings made in the arbitration to which they were personally not parties and by which they would argue they are not technically bound, even if they had appeared as witnesses which they may or may not do. If such a stance were adopted in the court proceedings, it is likely that there would be a re-litigation of matters already determined by the arbitrator. This may not be an abuse of court process (see *Protasco Bhd v Tey Por Yee and another appeal* [2018] MLJU 993; [2018] 5 CLJ 299). This may lead to a duplicity of issues and the risk of inconsistent decisions. However, if the court proceedings go first and the court makes a finding as to whether SPSB and the directors of SPSB had conspired with one or more of the other defendants to defraud FIC, that decision would be binding on the learned arbitrator. Even assuming I were to stay the court proceedings between FIC and SPSB pending arbitration, if the court proceedings are disposed of first then a finding against the directors of SPSB would still bind SPSB in the arbitration

proceedings as the directors of SPSB would be the privies of SPSB. This is a factor why the court proceedings should go first.

[51] In *Protasco*, the Court of Appeal took into consideration all the relevant factors and granted an anti-arbitration injunction. So did the Federal Court in *Jaya Sudhir*. In *Jaya Sudhir*, the Federal Court said this:

> [77] We are pressed by the first respondent's counsel with the argument that both the court proceedings and arbitral proceedings may run concurrently or in parallel even though all disputes arise from the same facts. It is necessary to refer on this point to the case of*Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 a decision of the New Zealand High Court in which Carter Holt sued Genesis Power (premised upon contract) and Rolls Royce (premised upon negligence) in court. This contract was between Carter Holt, Genesis Power and Kinleith, and did not contain any arbitration clause. Subsequently, Genesis Power commenced arbitration against Rolls Royce based on a separate contract entered into between them. The contract contained an arbitration clause. Rolls Royce moved the court in the suit commenced by Carter Holt for a stay of the arbitration commenced by Genesis Power. The High Court dealt with the issue of whether the stay application might be brought as an interlocutory application and whether there was jurisdiction to grant a stay of the arbitration proceedings. The court proceedings commenced by Carter Holt did not engage the application of art 8 of the New Zealand Arbitration Act 1996 (which is similar to our s 10 of Act 646). The possibility of concurrent proceedings (curial and arbitral) was envisaged by Randerson J, and the learned judge held at p 807 that it would be inappropriate to have both court and arbitral proceedings to proceed simultaneously. His Lordship said:
>
> > [61] Except to the extent clearly limited by statute, this court has a wide discretion to prevent abuse of its own processes. It is possible to envisage a case where there is such a substantial degree of overlap of factual or legal issues that it would be inappropriate for both court and arbitral proceedings to proceed simultaneously, even if the matters in the court proceeding were not the subject of an arbitration agreement in a way which would engage art 8. While a court might well be reluctant to intervene in such circumstances, I would not wish to preclude the court's jurisdiction to do so in an appropriate case. I express no view as to whether the present case might fall into that category.
>
> [78] Randerson J also referred to UK authorities on the issue of co-extensive or overlapping proceedings in court and arbitration at p 800 in the following manner:
>
> > [27] But the Courts have long recognised the existence of inherent jurisdiction to order the stay of arbitral proceedings where there are co-extensive or overlapping proceedings in the Court and before an arbitral tribunal. The authorities were summarised by Judge Humphrey Lloyd QC, sitting in the Queen's Bench Division, in *University of Reading v Miller Construction Ltd* at pp 41–45.
> >
> > [28] The leading decision is that of the English Court of Appeal in *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257. Moulton LJ drew attention at pp 268–269 to the undesirability of a race between the Court and a private tribunal

dealing with the same subject-matter. Farwell LJ held at pp 273–274 that the plaintiffs could not be deprived of their right to have recourse to the Court unless the Court made an order to that effect under s 4 of the then Arbitration Act (UK).

[52] The Court of Appeal in *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 dealt with the case where the respondent had appointed the appellant as its main contractor for a development project. Parties fell into dispute over payments that the appellant claimed was due to it. Both parties then agreed to an arbitration pursuant to the arbitration clause in the building contract. The respondent had in its defence in the arbitration claimed that part of the monies due to the appellant had been assigned to a third party. It also alleged that the appellant, the architect and the engineer had colluded and committed fraud on it. Premised on this allegation, the respondent filed an application in the High Court for an injunction to restrain the appellant from proceeding with the arbitration proceedings. The respondent succeeded, which led to the appeal.

[53] The Court of Appeal in dismissing the appeal held that the payments made to the third party, and the allegations of collusion and fraud against the architect and consultant should not be determined in the arbitration, as the third party, the architect and the consultant are not parties to the arbitration clause under the building contract. The appellate court also surmised that the allegations were closely connected with the main claim, and that they should be heard in court.

[54] The following passage from the Court of Appeal's judgment is pertinent:

> Where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court.
>
> In *The Eastern Saga; Oxford Shipping Co Ltd v Nippon Yusan Kaisha* [1984] 3 All ER 835, the court held:
>
> Since arbitration is a private procedure it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement. In the absence of the consent of all parties an arbitrator has no power to order that a dispute referred to arbitration under the agreement be heard or determined with another dispute involving a stranger which has been referred to arbitration under a different agreement even though the two disputes are closely related and a consolidated hearing would be convenient' (see also *Bauer (M) Sdn Bhd v Daewoo Corporation* [1999] 4 MLJ 545 at p 561 (CA); *The 'Vimeira'; Interbulk Ltd v Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep 66 at p 75).
>
> Moreover, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court (see *Tummock v Dartoris* (1889) 43 Ch D 150)

[55] In this case, the issues in the arbitration proceedings and the issues in the court proceedings cannot be divided distinctly. There is clearly an overlap of issues and the risk of inconsistent decisions. It is in the interest of justice for the court proceedings to proceed first. In that event, the arbitration proceedings can continue if the court were to rule that the development agreement is valid. If the court were to decide that the development agreement is null and void and illegal, then there would be no need for any arbitration proceedings.

[56] FELDA has also submitted that in the event the injunction is refused, damages will not be an adequate remedy as the arbitration proceedings will affect FELDA's proprietary rights in the FELDA Semarak lands and it will also affect FELDA's right to be heard.

[57] I have already dealt with the issue of FELDA's proprietary rights to its land. There is merit in the contention that damages will not be an adequate remedy as the arbitration proceedings will affect FELDA's proprietary rights in the FELDA Semarak lands and it will also affect FELDA's right to be heard although FELDA can also choose to be a witness in the arbitration proceedings.

[58] However, I do agree that SPSB has not shown that it is in the position to pay any substantial damages to FELDA and FIC. SPSB has not filed its audited accounts for the financial year from 1 January 2017 onwards. SPSB's audited accounts for the financial year ended 31 December 2016 show that they do not have any revenue and only have a reserve of RM10,797,995 whereas the FELDA Semarak lands have a total commercial value of up to RM1.062 billion. So I agree with the plaintiffs' submission that they have shown that damages would not be an adequate remedy since SPSB has not demonstrated its ability to pay damages.

[59] Taking into consideration all the relevant factors I am of the view that it would be just and convenient and the fairest approach to all parties to grant the injunction prayed for by the plaintiffs. Enclosure 61 is accordingly allowed with costs.

Plaintiff's application in encl 61 allowed with costs.

Reported by Mohd Kamarul Anwar